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In the Supreme Court of the United States

OCTOBER TERM, 1980

GREAT LAKES INTERNATIONAL, INC., PETITIONER

v.

PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE, ET AL.

JACKMAN & COMPANY, ET AL., CROSS-PETITIONERS

v.

GREAT LAKES INTERNATIONAL, INC., ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a domestic shipowner has standing to challenge a federal ship financing guarantee allegedly made in violation of the citizenship requirement of Section 1104(a)(1) of the Merchant Marine Act, 1936, 46 U.S.C. 1274(a)(1).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is not reported. The oral opinion of the district court (Pet. App. 4a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1980. The petition for a writ of certiorari was filed on September 8, 1980. The cross-petition for a writ of certiorari was filed on October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Sup. Ct. R. 19.5.

STATUTES INVOLVED

Section 101 of the Merchant Marine Act, 1936, 46 U.S.C. 1101, provides in pertinent part:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable * * *. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

Section 1104(a)(1), Title XI, of the Merchant Marine Act, 1936, 46 U.S.C. 1274(a)(1), provides in pertinent part:

> (a) Pursuant to the authority granted under section 1273(a) of this title, the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—
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> (1) financing * * * construction * * * of a vessel or vessels owned by citizens of the United States * * *.

STATEMENT

In December 1979, petitioner, a company engaged in dredging and marine construction operations in the United States and abroad, filed this suit in the United States District Court for the Southern District of New York. Petitioner's complaint concerned the proposed federal financing under Title XI of the Merchant Marine Act, 1936, 46 U.S.C. 1271 *et seq.*, of the construction of a large dredge to be owned by respondent United States Trust Company in trust for BameriLease Capital Corporation. Petitioner alleged that respondent Royal Bos Kalis Westminster Group N.V., a Dutch corporation, controls the prospective bareboat charterer of the dredge (National Dredging, Inc.) and that therefore the construction loan guarantee authorized by the Secretary of Commerce violates the citizenship requirement set forth in Section 1104(a)(1) of the Act, 46 U.S.C. 1274(a)(1).[1] Petitioner sought declaratory and injunctive relief.

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[1]Section 1104(a)(1) requires that the guarantee "aids in * * * financing * * * construction, reconstruction, or reconditioning of a vessel or vessels owned by citizens of the United States." 46 U.S.C. 1274(a)(1). Vessel owner, for purposes of the citizenship requirement, is broadly defined to include a bareboat charterer and anyone who controls or owns a corporation that owns or bareboat charters the vessel. See 46 C.F.R. 298.10; see also 46 U.S.C. 802.

In pleadings filed in the district court, both the federal respondents and the private respondents controverted petitioner's claim, detailing the American citizenship of the owners of the dredge in question (R. 217a-223a, 226a-229a).[2] Subsequently, the respondents moved for summary judgment, contending that petitioner lacked standing because the financing guarantee would not cause petitioner any injury and because petitioner's alleged interest in avoiding competition is not within the zone of interests protected by the citizenship requirement of Title XI. On March 12, 1980, the district court granted respondents' motion for summary judgment. The court concluded that even assuming that petitioner could show competitive injury, that claim is not within the zone of interests protected by the citizenship requirements of Title XI (Pet. App. 5a-6a). The court explained (*ibid.*):

> [T]here is no evidence that Congress, in enacting Title XI, intended to protect anyone from competition or to create any monopolies.
>
> * * * * *
>
> The objective of Title XI * * * is simply to build up a strong United States Merchant Fleet and to create employment for American seamen and American shipyards. The citizenship requirements for owners and operators are designed to make sure that the United States would ultimately control the resulting fleet, especially in times of national crisis or war. To the extent that such requirements have not been complied with * * * the entire country is the loser and [petitioner] is no differently situated than any other citizen.

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[2] "Private respondents" refers to the non-federal respondents in No. 89-366 and cross-petitioners in No. 80-549. "R." refers to the joint appendix filed in the court of appeals.

The court of appeals affirmed. The court observed that the legislative history of Title XI shows that "[t]he purpose of the bill is to encourage the use of private capital in the financing of ship construction" (Pet. App. 3a, quoting H.R. Rep. No. 1042, 83d Cong., 1st Sess. 1 (1953)). Accordingly, the court of appeals held that "[petitioner's] interest in restricting competition is not an interest covered by Title XI" and that "therefore [petitioner] has no standing to bring this action" (Pet. App. 3a).

ARGUMENT

Petitioner contends (Pet. 8-19) that it has standing to contest the Secretary's decision to guarantee the financing of a dredge that may someday operate in competition with dredges owned or operated by petitioner.[3] Consistent with the purposes of Title XI of the Merchant Marine Act, 1936, 46 U.S.C. 1271 *et seq.*, in general, and the citizenship requirement of Section 1104(a)(1), 46 U.S.C. 1274(a)(1), in particular, both courts below properly rejected this claim. Those rulings, on a question of first impression, are consistent with this Court's decision in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), and with the decisions of other courts of appeals applying the "zone of interest" test in other contexts. Further review of this question is unwarranted.

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[3]Petitioner erroneously suggests (Pet. 16-17 n.*) that the district court "found that the constitutional requirement of injury in fact was satisfied." In fact, the district court merely assumed arguendo that petitioner satisfies that requirement. See Pet. App. 5a. On appeal, the government contended that petitioner's claims of injury were too speculative and attenuated to satisfy the injury in fact standard. The court of appeals did not reach that question, however.

The courts below correctly concluded that petitioner is not within the "zone of interests" (397 U.S. at 153) protected by the citizenship requirement of Title XI of the Merchant Marine Act. To be sure, Section 1104(a)(1) requires that financing guarantees be made only on behalf of vessels "owned by citizens of the United States," a requirement that the government believes has been fully satisfied here. Nothing in that language suggests, however, that Congress thereby sought to protect shipowners like petitioner from foreign competition. Rather, the citizenship requirement appears designed to effectuate the national interest in having an American fleet "to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, [and] capable of serving as a naval and military auxiliary in time of war or national emergency." 46 U.S.C. 1101(a) and (b).[4]

Indeed, other provisions of the federal maritime laws expressly create limited forms of competitive protection for the domestic fleet. Thus, Section 27 of the Jones Act, 46 U.S.C. 883, provides that only American flag ships built in the United States may operate in the domestic trade, thereby precluding vessels built abroad and operated at a lower cost from competing in the domestic market. See *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*,

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[4]Of course, foreign controlled ships are subject to removal from the American fleet at any time and thus do not serve the general purposes of the Act. But, as the district court pointed out, to the extent the Secretary failed to comply with the citizenship requirement in this case, "the entire country is the loser and [petitioner] is no differently situated than any other citizen" (Pet. App. 6a).

444 U.S. 572, 574-575 (1980).[5] Likewise, Section 506 of the Merchant Marine Act, 1936, 46 U.S.C. 1156, specifically limits competition between subsidized and unsubsidized American vessels in the domestic trade. See *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, *supra*, 444 U.S. at 575-590. But neither the Jones Act nor Title V of the Merchant Marine Act is at issue in this case. Moreover, because Title XI contains no similar provision regarding the protection of the fleet from unfair or foreign competition, the court of appeals correctly concluded that petitioner's "interest in restricting competition is not an interest covered by Title XI" (Pet. App. 3a).

Petitioner cites no legislative history in support of its claim that Title XI concerns competitive injury, and we are aware of none. To the contrary, the relevant congressional reports demonstrate that Title XI was enacted "to encourage the use of private capital in the financing of ship construction." H.R. Rep. No. 1042, 83d Cong., 1st Sess. 1 (1953). See H.R. Rep. No. 2168, 75th Cong., 3d Sess. 29-30 (1938) (the primary purpose of Title XI is to "induc[e] private capital to become interested, on a sound business basis, in financing the construction, reconstruction, and reconditioning of our domestic shipping, thereby lessening further demands on the Treasury"). Furthermore, the legislative history indicates that the citizenship requirement is designed not to limit competition, but "to * * * safeguard our Government and insure the control of ships being built in American shipyards, to prevent foreign interests * * * [and] any

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[5]Petitioner's reliance (Pet. 8-9, 14-16) on *Central Vermont Transportation Co.* v. *Durning*, 294 U.S. 33 (1935), is misplaced. That case, which was decided three years *prior* to the enactment of Title XI, merely recognizes that the purpose of Section 27 of the Jones Act is "to provide for the promotion and maintenance of an American merchant marine." 294 U.S. at 38.

foreign government [from] hamper[ing] us or get[ting] control in any way of our ships or of our shipbuilding industries." 56 Cong. Rec. 8026 (1918) (remarks of Chairman Alexander of the House Comm. on Merchant Marine and Fisheries regarding Sections 2 and 9 of the Shipping Act of 1916, ch. 451, 39 Stat. 729, 730-731 (the statutes from which the citizenship requirement of Section 1104(a)(1) is derived)). See H.R. Rep. No. 2168, *supra*, at 3-6, 29-30; H.R. Rep. No. 1277, 74th Cong., 1st Sess. 4-5, 8-9 (1935).

Petitioner contends (Pet. 19) that the decision of the court of appeals will "frustrate[]" "the purpose of the review provisions of the Administrative Procedure Act." The APA itself recognizes, however, that many agency decisions are not subject to judicial review. See 5 U.S.C. 701(a); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). Likewise, and consistent with the decision below, other courts of appeals have concluded that a competitor may not challenge the administration of a particular government program because he does not fall within the zone of interest protected by the relevant statute. See, *e.g.*, *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F. 2d 145 (D.C. Cir. 1977); *Rodeway Inns of America, Inc.* v. *Frank*, 541 F. 2d 759, 764-766 (8th Cir. 1976); *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859, 865 (5th Cir.), cert. denied, 385 U.S. 815 (1966).[6] And here,

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[6]Petitioner erroneously suggests (Pet. 12-14) that there is a conflict among the courts of appeals on the proper application of the zone of interest test. As indicated above, there is no conflict with regard to the precise standing issue posed by this case. Moreover, the courts below considered both the general statutory scheme as well as the specific statutory section in question in applying the zone of interest test. Thus, even assuming that there is some difference among the courts of appeals regarding the zone of interest test, this case does not afford the Court an appropriate opportunity to resolve the alleged

Congress has made clear that "[a]ny guarantee, or commitment to guarantee, made by the Secretary of Commerce under this subchapter shall be *conclusive* evidence of the eligibility of the obligations for such guarantee, and the validity of any guarantee, or commitment to guarantee, so made shall be *incontestable*." 46 U.S.C. 1273(e) (emphasis supplied).

CONCLUSION

The petition and conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1980

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confusion. In reality, petitioner is simply dissatisfied with the zone of interest test altogether, notwithstanding this Court's recent reaffirmation of this prudential limitation on standing. See *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976).

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